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In The

Supreme Court of the United States

October Term, 1989

No. 89-1433 (11)

UNITED STATES OF AMERICA, APPELLANT

v.

SHAWN D. EICHMAN, ET AL.

No. 89-1434 (10)

UNITED STATES OF AMERICA, APPELLANT

v.

MARK JOHN HAGGERTY, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURTS FOR THE DISTRICT OF COLUMBIA AND FOR THE WESTERN DISTRICT OF WASHINGTON

BRIEF FOR APPELLEE STRONG

CHARLES S. HAMILTON, III
650 Colman Building
811 First Avenue
Seattle, Washington 98104
(206) 624-7364
Counsel for Appellee Darius Strong

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

I. Whether the First Amendment prohibits the United States from prosecuting appellees for burning a flag of the United States as a part of a political statement, in violation of 18 U.S.C. 700(a), as amended by the Flag protection Act of 1989, Pub. L. No. 101-131, §2(a), 103 Stat. 777.

II. Whether the Flag Protection Act of 1989 is facially violative of the First Amendment to the Constitution of the United States.

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The opinion of the Honorable Barbara Rothstein, Judge of the United States District Court for the Western District of Washington in the case of *U.S. v. Haggerty,* (89-1434 J.S. App. 1a-16a) is as yet unreported.

JURISDICTION

Appellee Strong accepts for these purposes the jurisdictional recitations presented by the United States in appellant's brief. (App. Brief, p.2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides, in relevant part: "Congress shall make no law . . . abridging the freedom of speech . . . ."

Section 700 of Title 18, United States Code, as amended effective October 28, 1989, by the Flag Protection Act of 1989, Pub. L. No. 101-131, §§ 1-3, 103 Stat. 777, provides:

> (a)(1) Whoever knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States shall be fined under this title or imprisoned for not more than one year or both.

(2) This subsection does not prohibit any conduct consisting of the disposal of a flag when it has become worn or soiled.

(b) As used in this section, the term "flag of the United States" means any flag of the United States, or any part thereof, made of any substance, of any size, in a form that is commonly displayed.

(c) Nothing in this section shall be construed as indicating an intent on the part of Congress to deprive any State, territory, possession, or the Commonwealth of Puerto Rico of jurisdiction over any offense over which it would have jurisdiction in the absence of this section.

(d)(1) An appeal may be taken directly to the Supreme Court of the United States from any interlocutory or final judgment, decree, or order issued by a United States district court ruling upon the constitutionality of subsection (a).

(2) The Supreme Court shall, if it has not previously ruled on the question, accept jurisdiction over the appeal and advance on the docket and expedite to the greatest extent possible.

STATEMENT

This Court held in *Texas v. Johnson*, 109 S. Ct. 2533 (1989), that application of a criminal statute of the state of Texas prohibiting desecration of venerated objects, violated the First Amendment rights of Gregory Johnson, who was criminally prosecuted for burning what that statute characterized as a "national flag". Tex. Penal Code

§ 42.09 (1989). This Court's decision in *Texas v. Johnson* is assigned by the Government as the cause for the amendment of 18 U.S.C. 700(a) (1988), into the form of what is entitled, "The Flag Protection Act of 1989," Pub. L. No. 101-131 §§ 1-3, 103 Stat. 777.[1] Salient alterations in the statute include the excision of the adjectival words "knowingly casts contempt upon . . . " which to some degree constitute a redundancy with the acts forbidden. The title of the statute was altered from the somewhat liturgical title of "Desecration of the Flag of the United States" to the more secular appellation of "The

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[1] The original statute enacted in 1968 reads as follows:

Desecration of the flag of the United States; penalties

(a) Whoever knowingly casts contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning, or trampling upon it shall be fined not more than $1,000 or imprisoned for not more than one year, or both.

(b) The term "flag of the United States" as used in this section, shall include any flag, standard, colors, ensign, or any picture or representation of either, or of any part or parts of either, made of any substance or represented on any substance, of any size evidently purporting to be either of said flag, standard, colors, or ensign of the United States of America, or a picture or a representation of either, upon which shall be shown the colors, the stars and stripes, in any number of either thereof, or of any part or parts of either, by which the average person seeing the same without deliberation may believe the same to represent the flag, standards, colors, or ensign of the United States of America.

Flag Protection Act of 1989". The former acts of desecration were retained within the body of the amended law and an additional prohibited act was added, that of maintaining the flag "on the floor or ground." The definition of what constituted "a flag of the United States" was substantially abbreviated. Acts destroying "worn or soiled" flags are exempted from criminal penalty.

Appellee Strong was a participant in a political demonstration in Seattle intended to protest the enactment of the Flag Protection Act. There appears to be no dispute that his participation in the demonstration was politically motivated and intended as a political statement. Appellant's Brief, p. 28; J.A. 80-81. In the course of the demonstration, a flag belonging to the United States Postal Service was burned. The flag was allowed to fly at night contrary to 36 U.S.C. § 174(a), establishing patriotic norms for use of the flag. J.A. 36, 37. Appellee Strong, along with others, was charged by criminal information with commission of two crimes, that of knowingly burning a flag of the United States in violation of 18 U.S.C. § 700(a) as amended by the Flag Protection Act of 1989, Publ. L. No. 101-131, § 2(a) 103 Stat. 777, and violation of 18 U.S.C. § 1361 which criminalizes destruction of government property. J.A. 34.[2] Relying significantly on this

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[2] That statute provides:

> Whoever willfully injures or commits any depredation against any property of the United States, or of any department or agency thereof, or any property which has been or is being manufactured or constructed for the United States, or any department or agency thereof, shall be punished as follows: . . .

18 U.S.C. Sec. 1361.

Court's opinion set forth in *Texas v. Johnson, supra,* the Honorable Barbara Rothstein held that the prosecution of appellee Strong under the Flag Protection Act of 1989 violated Strong's rights of expressive conduct protected by the First Amendment. The additional charge of destruction of governmental property was not affected by the ruling. The trial court found that the burning of the flag in question "was unquestionably expressive conduct intended to convey a political message and thus implicates the First Amendment." J.S. App. 5a. The court went on to review the government's interest in enacting such penal legislation under a standard requiring "the most exacting scrutiny". J.S. App. 6a. The court found that the predominant Governmental interest underlying the penal statute was the protection of the flag as a political symbol. J.S. App. 8a. The court found further that the interest in protecting the flag was related to the suppression of expression because that interest "can only be threatened by an act communicating a message which undermines the flag's symbolic value". J.S. App. 8a. The court indicated that " . . . the danger against which the government wishes to protect the flag only arises from the communicative element of the prohibited conduct." J.S. App. 8a. The court considered the various interests served by the statute as proffered by the Justice Department, the House and Senate: preservation of the value of the flag as a political symbol, preservation of the physical integrity of the flag, and vindication of the flag as an incident of sovereignty. The court determined that those interests could not justify what the court, relying upon this Court's ruling in *Johnson,* perceived as a Governmental effort to limit the use of the symbol-flag such that the permitted

uses of that symbol fostered the Government's political preferences; this message restriction, enforced by criminal sanction was found to constitute an abridgement of the freedom of speech. J.S. 15a.

SUMMARY OF ARGUMENT

I. The Flag Protection Act of 1989 is an express legislative effort to redeem the Flag Desecration act of 1968 from the kind of judicial scrutiny which the Court in *Texas v. Johnson*, 109 S.Ct. 2533 (1989) indicated it would apply to statutes or acts of this kind. The Court in *Texas v. Johnson* found that flag burning for political purposes was expressive conduct protected by the First Amendment. The Court applied a standard of "the most exacting scrutiny" to the Texas statute and the governmental interests which were asserted as justification for the suppression of speech. *Texas v. Johnson, supra* at 2543.

The history of flag desecration laws is of some moment to this argument. Until 1968, Congress had not enacted a flag desecration statute of national scope. It had enacted previously a flag desecration statute for the District of Columbia. By contrast, the Congress had enacted legislation which, without sanction, established a protocol or set of norms suggested as appropriate treatment and forms of respect for the flag of the United States. 36 U.S.C. § 170, *et seq.* In 1959, by Executive Order, an "official flag of the United States" was defined. Executive Order No. 10834, 24 F.R. 6865 (1959); 74 U.S.C. § 1, *et seq.* That definition included specific size requirements. Until 1968, statutes criminalizing certain forms of hostile treatment of the American flag, with the exception of federal legislation relating exclusively to the District of Columbia, were the handiwork of the state legislatures.

After this Court's ruling in *Texas v. Johnson*, the Congress sought to amend the Flag Desecration Act of 1968 so as to produce a form of legislation claimed to establish even-handed treatment towards respectful and disrespectful manipulation of the flag of the United States. The legislature enacted an act which retained former taboos against ideologically charged kinds of treatment of the flag: mutilation, defacement, and physical defilement. Additionally, a non-violent kind of forbidden act was added, that of maintaining the flag on the floor or ground. The Act's definition of a "flag of the United States" embraced a flag of any size and any substance. It did not confine its reach to flags constituting government property. Darius Strong was charged with burning a flag of the United States and in a separate charge he is claimed to have destroyed governmental property. The tandem nature of those charges tends to highlight the questions of how the charge of burning a flag of the United States substantially differs from the charge of destroying governmental property, and by what authority does the legislature seek to extend its reach to protect flags which are neither governmental property nor used on governmental property.

II. Appealing the trial court's ruling that the Flag Protection Act is unconstitutional, the Government asks the Court to recant its position expressed in *Texas v. Johnson* because a different jurisdictional voice has expressed its concern to protect the same interests addressed in *Johnson*. The Government suggests that the choral voice of Congress should have more resonance than the solitary voice of a state legislature. Fundamentally, however, the justification for the Act remains that which the

Court found deficient in *Texas v. Johnson*: the Governmental concern to protect the flag of the United States as a symbol of the nation and nationhood. Because of the Court's ruling in *Texas v. Johnson* that the flag of the United States is a symbol, rich in expressive content, and that restrictions on use of that symbol may not be used to shape public opinion, the Government advances other interests as justification for the legislation. Those interests are an interest in preserving the physical integrity of the flag of the United States in all circumstances, and preserving the flag as an incident of the nation's sovereignty. Appellee's response to the former interest is that it is integrally related to the communicative essence of the flag as symbol. The interest in preserving the flag as symbol and the interest in preserving the physical fabric of the flag cannot be segregated in any meaningful fashion. The stated interest in preserving the flag as an incident of sovereignty appears more as afterthought than interest. Review of congressional proceedings relating to the enactment of the Flag Protection Act does not evince an intensity of concern to vindicate this interest. The Act's sweep into the area of privately owned flags and use of privately owned flags on private property warrant the conclusion that this interest is not served in any narrowly tailored way. It is the appellee's position that the 1989 statute, although its appearance has changed, is intended to have the same effect as the Flag Desecration Act of 1968.

III. It is contended that the Flag Protection Act is facially overbroad in definitions of what constitutes the "flag of the United States" and in its sweep which embraces privately owned flags and treatment of flags on private property. The issue of whether the Legislature has

the power to criminalize what one does with a privately owned flag on private property is a question raised but not answered by the Court in *Spence v. Washington*, 418 U.S. 405 (1974). Absent the extension of the power to raise and support armies, a "broad and sweeping power" used to justify criminalization of the burning of draft cards in *United States v. O'Brien*, 391 U.S. 367 (1968), appellee questions what enumerated constitutional power authorizes the sweep of the Act.

The Act's definition of "flag of the United States" suffers from excess and overbreadth. The Act imposes no limit on size or on substance of a protected flag. Although the President has established an official flag of the United States with specific size requirements, that definition appears to have been ignored. The absence of size and substance definitions suggests that one could be prosecuted for private mistreatment of a miniature flag, the kind of flag which is neither supportive of the claimed interests of protection of the physical integrity of the flag or protection of the incidents of sovereignty. The broad definition of the flag of the United States, and consequent lack of fixed identity, suggests a fungibility of subject matter which seems to work at cross purposes with those interests claimed to justify the criminal legislation. Destruction or defacement of a flag, other than one having particular historical significance, does not threaten the available supply of "flags of the United States." This fungibility of the definitional flag renders the Act substantially different from the kind of act which would prohibit defacement of the Washington Monument, a unique and non-fungible structure. It is suggested that the overbreadth in the flag's definition and the projected reach of the statute are consequences of the Legislature's

concern to establish the appearance of content-neutrality of the Act which in turn supports its contention that the only purpose of the Act is to protect the "physical integrity of the flag in all circumstances."

IV. It is appellee's claim that the Flag Protection Act is not narrowly tailored to serve compelling, or substantial governmental interests. The Act is justified by reference to its subject matter, preservation of the flag as symbol, which in turn is communicative in essence. Because the Act prohibits the communicating of certain messages through manipulation of the flag-symbol, the Act relates to the content of expression and inhibits or restricts that content. Partisan emphasis on whether or not the Act is content-neutral derives from concern to invoke differing degrees of judicial scrutiny toward the Act. If an act is content-neutral, it may be argued that the Court should be more favorably disposed toward legislative preferences in enacting the legislation.

V. As the Court in *Texas v. Johnson* makes clear, politically-expressive conduct is protected by the First Amendment. Flag-burning as a dramatic form of political expression does not occupy the same judicially disfavored status as obscenity or defamation.

ARGUMENT

I. The First Amendment's protection of political expression prohibits the United States from criminally prosecuting appellees for knowingly burning flags of the United States in violation of the Flag Protection Act of 1989.

As the amicus brief of the United States Senate makes clear, Congress has for many years considered legislation

criminalizing various kinds of treatment of the flag. Senate Brief pp. 6-18. Between 1794, when Congress established the flag as a national emblem, and 1968, when national penal legislation was enacted with regard to the "flag," Congress had enacted what this Court has described as "precatory regulations" defining what should be appropriate civic treatment of the flag. *Texas v. Johnson, supra* at 2547; 36 U.S.C. § 173, *et seq.* These laws were designed, without sanction, to establish a protocol for citizens in their treatment of what was defined as an "official flag." Executive Order 10834, 24 F.R. 6865 § 31 (1959). These laws acknowledged burning as an appropriately "dignified" way of disposing of a flag which "is no longer a fitting emblem for display." 36 U.S.C. § 176(k).

The impetus for enactment of criminal sanctions for mistreatment of the flag appears to lie within the turmoil generated by the Vietnam war. *See generally,* John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis.* 88 Harvard Law Review, pg. 1482 *et seq.* (1975). Prior to the time, legislation criminalizing mistreatment of the flag was to be found in state's statutes. *See also,* Rosenblatt, *Flag Desecration Statutes: History and Analysis, 1972* Washington U.L.Q. 193. In 1917, Congress did enact a statute similar to the state desecration statutes which punished contemptuous treatment of the flag within the District of Columbia. 4 U.S.C. § 3 (1971). The state criminal statutes are described as focusing on two kinds of offensive activity: acts of "desecration," taking the legislative model which provides that "(n)o person shall publicly mutilate, deface, defile, defy, trample upon, or by word or act cast

contempt upon any such flag"; and acts of "improper use," which criminalized the superimposition of marks or objects upon a flag which was publicly displayed. *Ely, supra,* at 1502, 1503. The desecrating acts have been described as "ideologically charged acts" imbued "with a particular set of ideologically charged outlooks." *Ely, supra* at 1503. Both the enactment of 18 U.S.C. § 700, and its trimmed version, the Flag Protection Act of 1989, fall generally within the first described category. The language of this model which described acts of "contempt" toward the flag have been determined to be violative of the Constitution on vagueness grounds. *Smith v. Goguen,* 415 U.S. 566 (1974). Also condemned by this Court on First Amendment grounds were statutory prohibitions against use of contemptuous words with regard to the flag. *Street v. New York,* 394 U.S. 576 (1969).

In 1989, this Court ruled that the burning of a United States flag by Gregory Johnson constituted expressive conduct protected by the First Amendment of the Constitution of the United States; the Court found that application of the Texas penal statute criminalizing the "desecration of a venerated object," to Johnson's political act of burning an American flag constituted a violation of Johnson's First Amendment rights. It is undisputed, and indeed, emphasized by all parties, that the Flag Protection Act of 1989, and the ensuing criminal prosecution of appellee Darius Strong, derive from the Court's ruling in the *Johnson* case.

With apologies to the Court for perhaps excessive reference to a recent and much discussed ruling, it is suggested that reiteration of certain aspects of the ruling may be helpful to Strong's argument. The Texas penal

code provision is set forth below.[3] This Court quoted with apparent approval the Texas Court of Criminal Appeals which reversed Johnson's conviction:

> Recognizing that the right to differ is the centerpiece of our first amendment freedoms . . . a government cannot mandate by fiat a feeling of unity in its citizens. Therefore that very same government cannot carve out a symbol of unity and proscribe a set of approved messages to be associated with that symbol when it cannot mandate the status or feeling the symbol purports to represent.

Texas v. Johnson, supra p. 2537, citing *Texas v. Johnson,* 755 S.W.2d 92, 97 (Tex. 1988). This Court noted also the appellate court's reliance on this court's decision in *West Virginia Board of Education v. Barnett,* 319 U.S. 624 (1943) suggesting that for that kind of penal statute to be applied to disruptive acts of burning the flag, there must be evidence that the flag was "in grave or immediate danger of being stripped of its symbolic value". *Texas v. Johnson, supra* at 2537 citing *Barnett, supra* at 639. Appellee Strong suggests that this same standard should govern analysis of all governmental interests herein.

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[3] Desecration of Venerated Object

(a) A person commits an offense if he intentionally or knowingly desecrates:

(1) a public monument;
(2) a place of worship or burial; or
(3) a state or national flag.

(b) For purposes of this section 'desecrate' means deface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action.

(c) An offense under this section is a Class A misdemeanor.

Tex. Penal Code Ann. § 42.09 (1989).

The Court in *Johnson* pursued a course of analysis which may be repeated in the present context. The Court first made a determination that the burning of the flag constituted expressive conduct, thereby allowing Johnson to assert the protections of the First Amendment in seeking to overturn his conviction. *Texas v. Johnson*, 2538-2540. The Court looked to the speaker's or actor's intent in attempting to assess whether given conduct involved protected expression. The question posed was whether "[a]n intent to convey a particularized message was present and (whether) the likelihood was great that the message would be understood by those who viewed it". *Texas v. Johnson, supra* at 2539, citing *Spence v. Washington*, 418 U.S. 405, 410, 411 (1974). In this connection the Court acknowledged the symbolic essence which gives meaning to a national flag:

> That we have had little difficulty identifying an expressive element in conduct relating to the flag should not be surprising. The very purpose of a national flag is to serve as a symbol of our country; it is, one might say, 'the one visible manifestation of two hundred years of nationhood'.

Texas v. Johnson, at 2539 citing *Smith v. Goguen*, 415 U.S. 566, 603 (Rehnquist, J. dissenting). The Court went on to observe, "Pregnant with expressive content the flag as readily signifies this Nation as does the combination of letters found in 'America' ". *Texas v. Johnson, supra* at 2540.

The Court thereafter assessed what the Government asserted as those interests sought to be protected by the Act criminalizing expressive conduct. The Court found that the paramount governmental interest lay in "preserving the flag is a symbol of nationhood and national

unity." *Texas v. Johnson, supra* at 2541. Considering a proposed alternative interest, that of avoiding breaches of the peace, the Court found no evidence warranting such threat by the described activity and went on to observe that Texas had a disorderly conduct statute which appeared to provide a sufficient less restrictive alternative for purposes of punishing flag burning in order to keep the peace. *Texas v. Johnson, supra* at 2542, citing *Boos v. Barry*, 485 U.S. 327 (1988).

The Court held that the Government's interest in preserving the flag as a symbol of nationhood and national unity constituted an interest which was directly "related to the suppression of expression". *Texas v. Johnson, supra* at 2543. The Court found that concerns for preserving expressions or symbols of nationhood and national unity only "blossom" when treatment of the flag communicates some message; therefore the concern to preserve the flag as a symbol of national unity through penal legislation relates "to the suppression of free expression, thereby taking treatment of the weighing of the Governmental interest outside the realm of the test set forth by the Court in *U.S. v. O'Brien*, 391 U.S. 367 (1968). *Johnson, supra* at 2542.

In *Johnson* the Court found that a criminal conviction for flag burning under Texas law depended on the likely communicated impact of his expressive conduct. *Johnson* at 2543. The Court therefore found that the penal restriction on political expression was "content-based." *Texas v. Johnson, supra* at 2543. In pursuing this analysis, the Court reviewed the statute to determine whether or not it was "aimed at protecting onlookers from being offended by the ideas expressed by the prohibited activity." *Johnson,*

supra at 2543 n.7. This being the case with the Texas statute, the Court reviewed the Government's asserted interest with "the most exacting scrutiny". *Johnson, supra* at 2544. The Court found that the Government was seeking to "foster its own view of the flag by prohibiting expressive conduct relating to it". *Johnson* 2545.

Finally, the Court returned to the concern expressed in the beginning of its opinion, apprehension that the Government should be permitted to give privileged status to a symbol and then restrict public manipulation of the symbol, a symbol having cognitive and emotive impact upon virtually all American citizens, such that that symbol might communicate only a "limited set of messages". *Johnson, supra,* at 2540. The Court acknowledged that "to do so, we would be forced to consult our own political preferences and impose them on the citizenry, in the very way that the First Amendment forbids us to do." *Johnson, supra* at 2546. To the extent that there may exist a hierarchy of values in expression the Court appeared to emphasize the priority accorded political expression, political expression which was fundamental to *Johnson*'s conduct and to that of appellee Strong. " . . . He was prosecuted for his expression of dissatisfaction with the policies of this country, expression situated at the core of our First Amendment values." *Texas v. Johnson, supra* 2543.

II. The justifications by the Government for intrusion upon politically expressive conduct do not survive First Amendment scrutiny.

The Government's response to *Texas v. Johnson* is to claim that the penal statute of 1989 constitutes a new

juridical arena for a new balancing of governmental interests and personal freedoms. Appellant claims that the fact that Congress, as opposed to a state legislature, has asserted certain interests in preventing mistreatment of the flag, should alter the manner of the Court's review; it claims that the statute is content-neutral and therefore is subject to a more relaxed standard of review; and it claims that the purpose of the statute has nothing to do with expression but rather is an effort to preserve "the physical integrity of the flag in all circumstances". Amicus Brief Senator Biden p. 7. Additionally, the House of Representatives asserts that the Flag Protection Act of 1989 is an effort to preserve or protect the flag as an incident of our nation's sovereignty. Appellee Strong agrees that these interests have substance; he does not agree that his First Amendment rights to political expression should be criminally subordinated to those interests.

It is not the lesson of history that this Court is obligated to adopt Congress' view of the constitutionality of its own statutes. As indicated by Chief Justice Marshall,

> It is, emphatically, the province and duty of the judicial department, to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each . . . If, then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply.

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177-178 (1803). Further,

> Those, then, who controvert the principle, that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity maintaining the courts must close their eyes on the constitution and see only the law. This doctrine . . . would declare that if the legislature shall do what is expressly forbidden, such Act, notwithstanding the expressed prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits.

Marbury, supra at 177-178.

The principal of judicial deference to the legislature espoused by the Government should be tempered by the Court's concern that criminal statutes should be reviewed with particular scrutiny: *Houston v. Hill*, 482 U.S. 451, 459 (1986). Assuming that the Court may find that the statute does implicate First Amendment rights of expressive conduct, the Court may be reminded of its observation that "deference to a legislative finding cannot limit judicial inquiry where First Amendment rights are at stake". *Sable Communications of California, Inc. v. FCC*, ___ U.S. ___, 109 S. Ct. 2829 (1989), quoting *Landmark Communications, Inc. v. Virginia*, 485 U.S. 829, 843 (1975). Just as the Court has declined historically to substitute a congressional determination of the constitutionality of a statute for its own determination, so also the Court has resisted the temptation to intrude into the legislative sphere, insisting upon its lack of authority to rewrite an unconstitutional statute in order to bring that statute into conformity with the dictates of the Constitution. *Virginia v. American Bookseller Assn.*, 484 U.S. 383 (1988).

Although it may be argued that this Court should not strain to discern covert or obscure motivations underlying congressional action, it is suggested that where the purposes are reasonably clear, the Court is not required to avert its gaze. This Court has indicated, "In every case where legislative abridgement of (First Amendment) rights is asserted, the Court should be astute to examine the challenged legislation in question." *Schneider v. State*, 308 U.S. 147, 161 (1939). In another First Amendment context, the Court has recognized its obligation to consider whether or not a given legislative enactment constitutes an establishment of religion in violation of the First Amendment. That endeavor consists of a two-prong test,

> The purpose prong of the Lemon test asks whether the government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid.

Lynch v. Donnelly, 465 U.S. 668 at 690 (1984) (O'Connor, J. concurring).

Regardless of whether or not a meaningful distinction attends the particular legislative voice which recites the interests underlying the flag protection legislation, the interests herein expressed by Congress and the Government with regard to the Flag Protection Act of 1989, do not appear to differ fundamentally from the governmental interest addressed by the court in *Texas v. Johnson*. The Government has expressed an interest in preserving the symbolic value of the United States' flag as "The

unique symbol of the nation." Appellant's Brief, p. 34. The Court in *Johnson* found that the pursuit of that interest could not justify the criminalizing of the expressive political conduct of Mr. Johnson.

An alternative interest is proffered by the Appellant, that of "preserving the physical integrity of the flag in all circumstances." Amicus Brief, Senator Biden, P. 28. The Court in *Johnson* had suggested that a flag mutilation statute "aimed at protecting the physical integrity of the flag in all circumstances" might pass constitutional muster. *Texas v. Johnson, supra* at 2543; *Smith v. Goguen, supra* at 1255-1256 (Blackmun, J. dissenting.) The Flag Protection Act of 1989 does not protect the physical integrity of the flag in all circumstances. The description of some of the forbidden acts, mutilation, defacement, physical defilement, are destructive although ideologically freighted acts. The forbidden act of maintaining the flag on the floor or ground does not impair immediately the physical integrity of the flag. Evidence of that activity's origin suggests congressional disfavor of artistically hostile views of the flag and not with physical integrity. 135 Cong. Reg. 52811 (daily ed. March 16, 1989). One may argue that the definition of flag of the United States, which appears to condone miniaturization of the flag and recognizes flags of "any substance," does not evidence concern for the physical integrity of the flag. The statute does not address the issue of whether the flag may be flown in inclement weather which would certainly impair the physical integrity of the flag. The very exemption for worn and soiled flags, by decriminalizing disposal of flags too much touched by history suggests that the interest in the physical integrity of the flag is situational only.

Indeed, the "worn and soiled" flags are probably those most deserving of protection. The Court has noted an open question whether sewing an unofficial flag to a piece of clothing is an assault upon the physical integrity of the flag. *Smith v. Goguen, supra* at 570 n. 4.

The public nature of the present controversy should not be wholly ignored by the Court in its efforts to assess the purpose and effect of the Act: "Its prohibitory and regulatory effect and purpose are palpable. All others can see and understand this. How can we properly shut our mind to it?" *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 37 (1922), referring to the Child Labor Tax Law. It is difficult to understand what the integrity interest means without relating this interest to the other expressed interest, that of preserving the flag as a symbol of the nation and nationhood. The interest in preserving the physical integrity of the flag would seem to serve the primary interests of securing the visible and the symbolic value of the flag. The two interests are not discrete.

The House of Representatives asserts an interest which may derive from the dissent of Chief Justice Rehnquist in *Texas v. Johnson*. That interest is the interest in preserving the flag as an incident of sovereignty. It may at least be the subject of comment that this perceived governmental interest is of recent vintage in the flag mistreatment context. It derives largely from concerns residing in an international rather than an intranational context. The trial court found a notable absence of reliance upon this interest in the congressional hearings. J.A. 12a, 13a. In light of the Government's insistence that the Act's reach extends to privately owned flags in private homes, one is hard-pressed to understand how that

kind of expansive statute may be perceived to have been tailored narrowly to serve apprehension of injury to appurtenances of the sovereign.

In assessing the significance of interests advanced to justify the statute, the Court is reminded of a statement in the Senate's brief: "It is of course a matter of fair debate whether legislation to protect the flag is needed." Brief of United States Senate, p. 3.

III. THE FLAG PROTECTION ACT IS FACIALLY OVERBROAD IN ITS DEFINITION OF "FLAG OF THE UNITED STATES" AND IN ITS PROJECTED REACH INTO PRIVATE HANDS ON PRIVATE PROPERTY.

It would seem that a significant characteristic of what Congress has defined as a "flag of the United States" is the fungibility and polymorphism of the res, or flag. The definition adopted by Congress suggests application of the penal sanction of the Act to mistreatment of a "flag" capable of reproduction and replication to an extent limited only by the will of the manufacturer. Although the pattern is immutable, the fabric, "any substance," can be duplicated or replaced at will. This fungibility distinguishes a flag of the United States from the Lincoln Memorial or any particular flag used in the course of war or ceremony in our nation's history.

There is also no definitional limitation within the statute upon the size of a protectable flag. The protected flag may bear its official size as set forth in Executive Order 10834 (Sec. 4, U.S.C. *et seq.)*, or it may be a desk-top flag or the kind of flag that children affix to their bicycles. The Court has noted concerns of definition regarding the "flag." *Smith v. Goguen, supra* at 579 n. 24.

A protected flag need not be governmental property, as urged by the Government. Appellant's Brief, pp. 29, 30, n. 24. The Government is urging upon the Court an interpretation of the statute which criminalizes the maintaining of a privately purchased flag upon the floor or ground of private premises. Under the cloud of this Act, one cannot be interred with a flag of the United States without concern by the bereaved that this will be the subject of prosecution.

The concept of facial overbreadth is not a concept which this Court is quick to apply. *Massachusetts v. Oakes*, ___ U.S. ___, 109 S. Ct. 2633 (1989). As the Court has noted, "We have addressed overbreadth only where its affect may be salutary." *Massachusetts v. Oakes, supra* at 2637. The Court has indicated that "overbreadth is a judicially created doctrine designed to prevent the chilling of protective expression." *Massachusetts v. Oakes, supra* at 2638. The concept is a vehicle for allowing one whose conduct could constitutionally be prescribed by a statute to assert the rights of others not before the Court whose constitutional rights are infringed by an overbroad statute. *Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

The concept of facial overbreadth is distinct from the generally accepted proposition that regulations affecting expressive conduct must be "narrowly tailored to serve an important or substantial state interest". *Clark v. Community for Creative Non-violence*, 468 U.S. 288 at 298 (1984). However, the latter term has been employed in overbreadth analysis. *Houston v. Hill*, 482 U.S. 451, 465 (1986). This latter concept, applicable to challenges to the constitutionality of a statute as applied to the complaining

party, is part of a test which parallels the test adopted by the Court in *United States v. O'Brien*, 391 U.S. 367 (1968). As discussed below, the position of the Government in this case and the position of the Court in *Texas v. Johnson* is that the *O'Brien* test, providing a more legislative-favoring review of the impact of a statute upon First Amendment freedoms does not apply to flag burning as a target of the Flag Protection Act of 1989. The brief of Senator Biden argues against the Government on this point. Brief of Senator Biden, p. 9.

Utilization of the overbreadth doctrine to strike down a piece of legislation, requires a showing that the statute is "substantially overbroad, judged in relation to the statute's plainly legitimate sweep." *Broadrick, supra* at 615. The definition of what is "substantial" is not empirically precise. For these purposes, however, it is respectfully suggested that the statutory definition of "flag of the United States," extending as it does to privately purchased flags of no particular size or substance when used by individuals on private property, evidences the Act's excessive reach into protected areas of expression. This over-reaching is a logical consequence of a legislative effort to achieve "content neutrality" in the Act. This Court in *Spence v. Washington* expressed doubts about the authority of government to extend "improper use" statutes to privately owned flags on private property. *Spence v. Washington*, 418 U.S. 405, 408, 409 (1974).

Since at least 1959, Congress has designated an "official" form for the "flag of the United States". 4 U.S.C. § 1, *et seq*. Executive Order No. 10834 established authorized sizes of the flag of the United States for executive agencies; that flag constitutes "the official flag of the United

States". Executive Order No. 10834, 24 F.R. 6865 (1959). The Flag Protection Act of 1989 makes no reference to that official flag but rather refers generically and unrestrictively to the flag of the United States. The Act extends to flags of unofficial size, presumably even miniature flags, flags of diminished physical integrity and unserviceable to the sovereign. The Act's expansive, definition of the "flag of the United States" corroborates the hypothesis that the statute serves predominately the Government's interest in preserving the flag as the symbol of the nation in all decedent circumstances. Expansive language of a penal statute which permits selective prosecution may offend the Constitution additionally on ground of vagueness and lack of due process. *Smith v. Goguen*, 415 U.S. 566, 573-575 (1974).

The Government asserts that Congress in the Flag Protection Act attempted to "protect the physical integrity of the flag under all circumstances". U.S. Brief, p. 28. This interest received heightened attention after the Court in *Texas v. Johnson* suggested that such a statute might survive judicial scrutiny. *Texas v. Johnson, supra* at 2543. The plenary assertion of the government's power over private flags seems to have been perceived as necessary to establish a content neutral statute. The tension between the need to establish a content neutral statute and the consequence of overreaching into areas where Government need not and should not tread become apparent. Because the statute applies to flags large or small, flags of any substance, flags in the home and flags privately purchased for private use, it is respectfully suggested, that the statute is facially overbroad.

IV. THE FLAG PROTECTION ACT OF 1989 IS NOT THE LEAST RESTRICTIVE MEANS OF PRESERVING A LEGITIMATE GOVERNMENT INTEREST NOR IS IT CONTENT-NEUTRAL.

It is not this author's wish to smirch the richness and intensity of the emotional and intellectual impact of the American flag upon the people of this nation. However, one may still question whether or not the Government has a right to criminalize ideologically charged mistreatment of privately-owned flags on non-governmental property. It may be argued that only in the facial overbreadth context can Darius Strong, who is claimed to have destroyed governmental property, be permitted to raise questions regarding overextension of the Flag Protection Act into areas wherein individual citizens and not the Government should have hegemony. Nonetheless, appellee Strong would argue that the Flag Protection Act is not fashioned in a manner which provides the least intrusive means of serving what the Government claims to be a substantial, or compelling, Governmental interest. The least intrusive means would confine its reach to destruction of governmental property. Whether or not this less-restrictive-alternative kind of analysis would apply to expressive conduct in this context may be questioned. Cf. *Ward v. Rock Against Racism*, 109 S. Ct. 2746 (1989), holding that the least intrusive means test does not apply to legislation which implicates First Amendment rights but which is not content-based. The Court in that case found that sound amplification guidelines conditioning use of an amphitheater constituted a regulation of the "time, place or manner of protected speech" which must be "narrowly tailored" to serve the Government's legitimate

content-neutral interests, but need not be the "least restrictive or least intrusive means of doing so." *Ward, supra*, pp. 2757-58. However, in that case the Court noted that the Government may not regulate expression in such a manner that "a substantial portion of the burden on speech does not serve to advance the Government's goals". *Ward, supra* at 2758. The Court indicates also that "if strict scrutiny," or "the most exacting scrutiny" is to be applied to the regulation, then the Court will inquire as to whether there are alternatives to the particular legislations which are less restrictive with regard to protective speech. In this case, it is respectfully suggested that the other criminal charge against appellee Strong, that of destroying governmental property, a post office flag, provides suitably restricted reach for the Government in its efforts to protect official Government-owned flags from acts of injury or destruction. Beyond the reach of that statute lies an ill-defined region where the Government seeks to assert a dignitary interest in shaping the attitudes of the governed toward the Government.

Arguments addressed to content neutrality are arguments attempting to trigger particularized degrees of judicial intensity in reviewing the intrusion of the Act upon First Amendment protections. It may be argued that if the statute is content-neutral, then the standard of "exacting scrutiny" of the purpose and effect of the statute should not be assayed by this Court. The Government claims that the Flag Protection Act is content neutral because it has excised any reference to acts or words of contempt which historically were considered correlative to mutilation or defacement or desecration of the flag. 18 U.S.C. § 700(a)(1968). Legislative history, public discussion, and

the statutory words themselves, indicate that the excised words are immanent in the Act.

In 1968 the Desecration Act criminalized casting contempt on the flag by mutilating or burning it. Flag mutilation was a contemptuous act. Appellee Strong contends that excision of the predicating words does not in any way signal that the statute was intended to have a different meaning in 1989 than it did in 1968. It is abundantly apparent by the Government's own presentation herein, that the purpose in the legislative surgery was not to produce a different kind of penal focus, but rather to produce a facially permissible statute, bearing the patina of even-handedness. Congress' choice of the wording of the statute does not prohibit the Court from "conducting an independent determination of a statute's constitutionality based upon its actual effect." *Meese v. Keene*, 481 U.S. 465, 488 (1987) (Blackmun, J. dissenting). As indicated by the Court on another occasion; "The fact that the statute's practical effect may be to discourage protected speech is sufficient to characterize (it) as an infringement upon first amendment activities. *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 255 (1986).

A statute is content neutral if its restrictions on First Amendment freedoms are those which "are justified without reference to the content of the regulated speech." *Boos, supra* at 320 citing *Virginia Pharmacy Board v. Virginia Citizens Consumer Council), Inc.*, 425 U.S. 748, 771 (1976). The Trial Court in *Haggerty* found that the Flag Protection Act is not content neutral. J.S. App. pp. 9a-10a. The Court found that the Government's justifications for its statute, protecting the flag as a political symbol, related to the content of the regulated speech. The Court found that the

justification for the statute was an effort to produce a non-hostile or favorable public attitude towards the flag and, by extension, toward the nation which it symbolized. The justification, then, constituted a proscription on what messages could be communicated by use of the flag, an object which the Government had singled out as a form of speech. It is suggested that the very singling out of the flag as a "unique symbol" and as a symbol which cannot be defaced and mutilated or maintained upon the ground of itself establishes a content-base. By singling out the flag as a symbol the Government has suffused it with public meaning and impact. The flag has been created as a form of speech which cannot constitutionally be shaped to suit the Government's ends.

Were the Court to find that the statute is content-neutral it may be argued that the statute conforms to judicial standards governing restrictions on the time, place or manner of protected speech, standards which require that those restrictions "are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Clark v. Community for Creative Non-violence*, 468 U.S 288, 293 (1984). This standard may apply if the Court found that the statute in question was a time, place or manner type of regulation. Appellee Strong contends that this act does not constitute such a mildly intrusive regulation, as it forbids integrally and absolutely, certain modes of communicating certain political messages about the Government. It limits the use of the flag to production of preferred messages.

The *Clark* test parallels a test which inquires whether there may be a sufficiently important governmental interest in regulating a non-speech element, therein the burning of a draft card, such as will justify "incidental limitations on First Amendment freedoms." *U.S. v. O'Brien*, 391 U.S. 367, 378 (1968). The *O'Brien* test would countenance such "incidental limitations" when the governmental interest " . . . furthers an important or substantial governmental interest; if the interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged first Amendment freedoms is no greater than is essential to the furtherance of that interest." *O'Brien, supra* at 377. The Court in *Johnson* found that the *O'Brien* test did not apply where the governmental interest in the flag's symbolic value was related to the suppression of free expression. *Texas v. Johnson, supra* at 2542.

The *O'Brien* test was applied when the parties agreed that the draft card mutilation statute was "content-neutral." *O'Brien, supra* at 375. The draft card law enacted pursuant to Congress' "broad and sweeping" power to raise and support armies was found to have substantial utility to the government's record keeping processes. The flag has by contrast no apparent utility extrinsic to, and independent of, its obvious symbolic and communicative value.

V. Dramatic political expression has social value.

An additional argument of the Government concedes that the Act forbids expression, but posits that the forbidden kind of expression is of so little social value that the

expression doesn't merit constitutional protection. These kinds of outcast expression include obscenity, fighting words and defamation. This argument was rejected by the Court in *Texas v. Johnson* when it found that flag burning with political intent constituted expressive conduct which was permitted and protected by the First Amendment. *Texas v. Johnson, supra* at 2542. None of the examples cited by the Government, obscenity, defamation, fighting words, reflect any relationship to political expression which has been found by this Court to "lie at the core of out first amendment values." *Texas v. Johnson, supra* at 2543; *Boos v. Barry, supra* at 318. In this context it might be noted that not only was the purpose of Darius Strong's participation in the demonstration which produced a burned flag political, but it represented a dialogue, albeit an impassioned one, between an individual and the authority of government. As his declaration makes clear, his protest was a criticism not of the people of the United States of America and the texture of their history, but rather of what he considered to be the excesses of Government in suppressing the freedom of individuals. The Flag Protection Act of 1989 radiates with concern that certain attitudes hostile to the Government should not be communicated toward a flag of the United States, which is described in generic and fungible form. Mr. Strong's involvement in a demonstration where a U.S. Postal Office flag was burned, constituted his effort to dramatize his rights of expression against the Government's efforts to limit them. Although we may not rush to applaud the act of burning a flag of the United States, it is respectfully suggested that neither should we be quick to

countenance imprisonment for one who performs this act to dramatize his political views.

In analogous circumstances this Court has observed: "We cannot sanction the view that the Constitution, while solicitous of the cognitive component of individual speech, has little or no regard for that emotive function, which practically speaking, may often be the more important element of the overall message sought to be communicated." *Cohen v. California*, 403 U.S. 15, 26 (1971). The wearing of the statement "Fuck the Draft" on a jacket is both a statement and an act, producing offensive communication. *Cohen, supra*. Just as Massachusetts appears to have weathered the assault upon its sensibilities posed by the youthfully defiant expression on Mr. Cohen's jacket, it is respectfully suggested that this nation and its flags, official and unofficial, will survive in good health the constitutionally tolerated acts of flag burning as political statement.

CONCLUSION

The judgment of the District Court in *United States v. Haggerty*, No. 89-1434, should be affirmed.

Respectfully submitted,

/s/ Charles S. Hamilton, III
CHARLES S. HAMILTON, III
Attorney for Appellee Strong

650 Colman Building
811 First Avenue
Seattle, Washington 98104

(206) 624-7364